No. 88-32

(6)

In the Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

RICHARD N. MORASH

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether an employer's agreement to pay departing employees for accrued vacation time from the employer's general assets, rather than from a trust fund, constitutes an "employee welfare benefit plan" under Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(1).

2. Whether, if such an agreement is a welfare benefit plan covered by ERISA, prosecution under a Massachusetts criminal statute that penalizes the nonpayment of vacation benefits is preempted by ERISA's broad preemption provision, or rather is saved from preemption as within the exception of Section 514(b)(4) of ERISA, 29 U.S.C. 1144(b)(4), for generally applicable criminal laws of a state.

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INTEREST OF THE UNITED STATES

At issue in this case is the interpretation and validity of a Department of Labor regulation, 29 C.F.R. 2510.3-1(b), defining the coverage of Title I of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. (& Supp. IV) 1001 *et seq.* That regulation identifies certain "payroll practices" that are not "employee welfare benefit plan[s]" covered by the statute, and the practices include vacation payments made from an employer's general assets rather than from a trust fund. As a consequence of being outside the scope of ERISA, state laws relating to such payroll practices are not preempted under the general preemption provision of ERISA, Section

514(a), 29 U.S.C. 1144(a). The Massachusetts Supreme Judicial Court in this case adopted an interpretation of the payroll practices regulation limiting its application in a manner inconsistent with the Secretary of Labor's construction of that regulation. The Secretary of Labor has a substantial interest in urging what she views as the correct interpretation of the Department's regulation in this case.

The Secretary also has an interest in the second issue raised by this case—which needs to be addressed only if the Court rejects the Department's interpretation of the payroll practices regulation. Having found post-termination vacation payments made out of general assets to constitute a "welfare plan" covered by ERISA, the court below further held that the Massachusetts criminal statute at issue (Mass. Ann. Laws ch. 149, § 148 (Law. Co-op. 1976 & Supp. 1988)) does not come within the exception to ERISA preemption for generally applicable state criminal laws (§ 514(b)(4), 29 U.S.C. 1144(b)(4)). The Secretary is charged with enforcing the reporting and disclosure requirements and the fiduciary obligations that Title I of ERISA imposes on administrators of employee benefit plans covered by the Act, and therefore has a substantial interest in the proper resolution of that issue. She agrees with the conclusion of the court below.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(1) of the Employee Retirement Income Security Act, 29 U.S.C. 1002(1), provides:

> For purposes of this subchapter:
>
> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or

> program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).[1]

Section 514 of ERISA, 29 U.S.C. (& Supp. IV) 1144, provides, in pertinent part:

> (a) Except as provided in subsection (b) of this subsection, the provisions of this chapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * *.
>
> (b) * * *
>
> * * * * *
>
> (4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

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[1] The cross-reference is to Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c), which recognizes an employee benefit plan exception from the restrictions otherwise imposed on financial transactions between employers and employees or their representatives. That section lists, in addition to many of the same benefits enumerated in Section 3(1) of ERISA, "pooled vacation, holiday, severance or similar benefits."

The payroll practices regulation, 29 C.F.R. 2510.3-1, provides, in pertinent part:

> (b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—
>
> * * * * *
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons[.]

Mass. Ann. Laws ch. 149, § 148 (Law. Co-op. 1976 & Supp. 1988) provides, in pertinent part:

> Every person having employees in his service shall pay weekly each such employee the wages earned by him * * *; and any employee discharged from such employment shall be paid in full on the day of his discharge * * *. The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.

STATEMENT

1. A Massachusetts criminal law, Mass. Ann. Laws ch. 149, § 148 (Law. Co-op. 1976 & Supp. 1988), requires employers to pay in full to any discharged employee, on the day of discharge, all wages

earned by the employee, including "any holiday or vacation payments due an employee under an oral or written agreement." For purposes of the statute, the president of a corporation is deemed to be the employer of the corporation's employees (*ibid.*). Failure to comply is punishable by a fine of $500 to $3,000 or imprisonment for up to two months, or both (*ibid.*).

In May 1986, petitioner, the Commonwealth of Massachusetts, issued two complaints in the Boston Municipal Court against respondent, Richard N. Morash, president of the Yankee Bank for Finance and Savings (Pet. App. A4-A8). The complaints alleged that Morash had failed to compensate two discharged bank vice presidents for unused vacation days (*id.* at A7-A8). It is undisputed that, upon termination of their employment, bank employees who have accrued vacation time are entitled to receive a lump-sum cash payment from the bank's general assets for the unused vacation time (*id.* at A9).

Morash moved to dismiss the complaints on the ground of federal preemption (Pet. App. A5-A6). He argued that the bank's vacation policy constitutes an "employee welfare benefit plan" within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(1), and that the state's prosecution for failure to make vacation payments therefore runs afoul of Section 514(a) of ERISA, 29 U.S.C. 1144(a), which expressly preempts "any and all State laws insofar as they * * * relate to any employee benefit plan." Pursuant to the procedure in Mass. R. Crim. P. 34 for resolving an "important or doubtful" "question of law," the trial judge reported the question to the

Massachusetts Appeals Court for decision, and the Massachusetts Supreme Judicial Court sua sponte accepted the case for direct appellate review (Pet. App. A4).

2. The Supreme Judicial Court of Massachusetts held that ERISA preempts the state's prosecution of Morash (Pet. App. A32).

a. The court first focused on a Department of Labor regulation, 29 C.F.R. § 2510.3-1(b)(3), which provides that numerous "payroll practices," including the payment of vacation benefits "out of [an] employers' general assets" rather than from a trust fund, are not "employee welfare benefit plan[s]" within the meaning of ERISA.[2] It noted that in *Barry* v. *Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707 (1985), it had "interpreted the Department of Labor regulation as applying only to an employer's discretionary practices and not to those contractually required" (Pet. App. A12). In so concluding, the court in *Barry* had relied upon the district court's decision in *California Hosp. Ass'n* v. *Henning*, 569 F. Supp. 1544 (C.D. Cal. 1983), rev'd, 770 F.2d 856 (9th Cir. 1985), cert. denied, 477 U.S. 904 (1986), which noted that ERISA Section 3(1), 29 U.S.C. 1002(1), lists "vacation benefits" within the definition of "employee welfare benefit plan[s]"

[2] The Department of Labor promulgated the payroll practices regulation to distinguish payments that are like wages, which are not governed by ERISA, from the employee benefits that are covered by the federal statute. 40 Fed. Reg. 24642-24643 (1975). As a consequence of being defined as a payroll practice rather than as a welfare plan, a practice is outside the scope of ERISA's coverage, and state laws relating to such a practice are not preempted by Section 514(a).

covered by ERISA, and concluded that "'[i]f that regulation does indeed intend ERISA exemption of every unfunded vacation program, it is at clear odds with language of the statute itself'" (569 F. Supp. at 1546 (quoted in *Barry*, 394 Mass. at 837, 478 N.E.2d at 712)).

The court below next concluded that it "need not decide" whether to modify its interpretation of the regulation in light of the Ninth Circuit's reversal of the district court decision in *California Hosp. Ass'n* (Pet. App. A13). The court found *California Hosp. Ass'n* to be distinguishable as dealing with "an employer's payments of compensation out of general assets to an employee *while he or she is on vacation*," rather than "a lump-sum payment for unused vacation time upon discharge" (*ibid.* (emphasis by the court)).[3] Payments of vacation benefits following termination of employment, the court below held, "are more akin to severance pay than to ordinary wages" (*ibid.*), and, unlike wages, severance pay is plainly governed by ERISA (*Holland* v. *Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985), aff'd, 477 U.S. 901 (1986); *Gilbert* v. *Burlington Indus., Inc.*, 765 F.2d 320 (2d Cir. 1985), aff'd, 477 U.S. 901 (1986)).[4]

[3] In fact, contrary to the assumption of the court below, the issue in *California Hosp. Ass'n* was whether a California statute requiring the payment of accrued vacation time *on termination* was preempted. See 770 F.2d at 858.

[4] The court below also rejected Massachusetts' argument that the bank's vacation policy, like the state-mandated plant-closing benefits at issue in *Fort Halifax Packing Co.* v. *Coyne*, No. 86-341 (June 1, 1987), involves a *benefit* as opposed to an employee benefit *plan*, and therefore is not covered by

b. Having decided that the vacation pay practices in issue constitute a welfare plan (Pet. App. A20), the court further concluded that the Massachusetts statute "relates to" such a plan within the meaning of ERISA's preemption provision. The court explained that "the statute as applied represents an attempt by the State to enforce the provisions of the plan," and concluded that "State laws that attempt to enforce benefit plans are preempted" (Pet. App. A23 (citation omitted)). The court further held that the Massachusetts statute is not saved from preemption by the proviso in Section 514(b)(4) of ERISA that no "generally applicable criminal law of a State" is preempted. That provision, the court stated, is " 'directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example.' " Pet. App. A27 (quoting *Commonwealth* v. *Federico*, 383 Mass. 485, 490, 419 N.E.2d 1374, 1377 (1981)). Here, the court concluded that "[b]ecause our statute is limited to the nonpayment of 'wages' by an employer to an employee, including agreed-upon vacation payments which will often be funded from 'employee benefit plans,' " it "is not so general as to fall within the exception to preemption provided by Congress" in Section 514(b)(4) (Pet. App. A31-A32).

ERISA. The court noted that this Court's holding in *Fort Halifax* that there was no "plan" turned on a finding that the state law mandated " 'a one-time lump-sum payment triggered by a single event' " (Pet. App. A16 (quoting *Fort Halifax*, slip op. 9)). By contrast, the court concluded, the bank's vacation policy necessitated "a periodic demand for adequate funds to meet commitments" (Pet. App. A18).

SUMMARY OF ARGUMENT

1. It is clear from both the text and the legislative history of ERISA that Congress was concerned with regulating and assuring payment of certain types of benefits promised to employees, and that it was particularly concerned with abuses relating to trust funds established to provide employee benefits. It is equally clear that Congress in ERISA was not addressing problems related to the payment of ordinary cash wages from an employer's general assets. In light of ERISA's focus on benefits rather than wages and Congress's particular concern with trust fund abuses, the Secretary of Labor by regulation (29 C.F.R. 2510.3-1(b)) interpreted the Act's definitional provisions to exclude from the Act's coverage routine employer payroll practices, including vacation leave paid directly from general assets rather than from a trust fund. The Secretary's interpretation of the statute is consistent with the language, history, and purposes of the Act, and is entitled to deference as a reasonable and permissible construction of the statute by the agency entrusted with its administration. The construction of the court below, in contrast, would impose unnecessary regulatory burdens on every employer providing paid vacation leave, and would allow any employee complaining that he was improperly denied vacation benefits to bring suit in federal court.

The Massachusetts Supreme Judicial Court erroneously concluded that a lump-sum payment from general assets for unused vacation time upon discharge is covered by ERISA because it is more like severance pay, a type of benefit Congress unquestionably intended ERISA to cover, than like ordinary

wages. While any payment received by an employee upon termination of employment superficially resembles severance pay simply by virtue of its timing, there is no reason why vacation payments made from general assets should be covered or not covered under ERISA depending on whether made during or at the end of one's term of employment. Unlike severance pay, which is payable solely upon the contingency of termination of employment, vacation wages generally are payable throughout the employment relationship and are not contingent upon discharge or separation. And, in contrast to severance pay, which is invariably an added payment above and beyond ordinary wages, accrued vacation leave is a component of ordinary wages.

2. If we are correct in viewing respondent's vacation benefits as payroll practices rather than as a welfare plan, then Massachusetts is free to prosecute respondent for failing to pay the benefits promised. If, on the other hand, we are incorrect on that point, the Court must then construe ERISA's general preemption provision and its exception for generally applicable criminal laws. We agree with the court below that ERISA's preemption clause, Section 514(a), which expressly supersedes "any and all State laws insofar as they * * * relate to" plans covered by the statute, bars Massachusetts' prosecution of the bank for failure to pay vacation benefits. The acknowledged purpose of this prosecution is to enforce the bank's vacation leave policy, so the statute plainly "relate[s] to" the plan.

The Massachusetts wage payment statute, which imposes criminal penalties for nonpayment of vacation benefits, is not saved by Section 514(b)(4),

ERISA's exception to preemption for "generally applicable" state criminal laws. The statute is aimed specifically at the non-payment of wages and certain fringe benefits, and, like the court below, we think that Congress did not mean to save such narrowly-focused statutes from preemption. Rather, Congress had in mind more broadly-based statutes such as those prohibiting fraud or embezzlement. If a law aimed specifically at employee benefits is saved from preemption by Section 514(b)(4), then it is not clear what kind of criminal law is not "generally applicable."

In addition, as the court below stated, the statute at issue plainly provides an alternative means by which employees may seek to obtain benefits. In *Pilot Life Ins. Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), however, this Court stressed that ERISA's comprehensive civil enforcement provisions were intended to provide the exclusive means for challenging benefit denials. Furthermore, as this Court has explained, ERISA's preemption provision was designed to eliminate the threat of conflicting and inconsistent state and local regulation. *Fort Halifax Packing Co.* v. *Coyne*, No. 86-341 (June 1, 1987), slip op. 6. If statutes such as the Massachusetts law at issue are not preempted, states will be able to impose conflicting and inconsistent requirements on employee benefit plan administrators.

ARGUMENT

I. AN AGREEMENT TO PAY ACCRUED VACATION BENEFITS UPON TERMINATION OF EMPLOYMENT, FROM AN EMPLOYER'S GENERAL ASSETS, IS NOT A WELFARE PLAN GOVERNED BY ERISA

Congress enacted ERISA to correct "two principal abuses: mismanagement of funds accumulated to finance * * * benefits, and failure to pay employees the benefits promised" (*California Hosp. Ass'n*, 770 F.2d at 859)). Prior to ERISA's enactment, the Secretary of Labor testified in detail with respect to abuse of trust funds, listing 22 examples of mismanagement drawn from both pension and welfare funds. *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H. R. 1046, and H.R. 16462 Before the Subcomm. on General Labor of the House Comm. on Education and Labor*, 91st Cong., 1st & 2d Sess. 470-472 (1970).[5] Concerns about such abuses led Congress to impose strict fiduciary duties on plan administrators. See 120 Cong. Rec. 4277 (1974) (statement of Rep. Perkins) (citing "breaches of faith and self-dealing on the part of fund trustees and administrators"); 119 Cong. Rec. 30004 (1973) (statement of Sen. Williams) (citing "embezzlement and bribery" involving trust funds).

[5] Secretary Schultz cited, among the 22 examples of abuse, "a jointly-administered welfare and retirement fund * * * [that] deposited 67 million dollars in a non-interest-bearing account in a bank that was controlled by the union which was a party to the collective bargaining agreement setting up the fund." He also cited a welfare plan providing medical benefits that paid 50 cents in administrative costs for every dollar of benefits "due in part to the excessive fees paid to the fund trustees." *Private Welfare and Pension Plan Legislation Hearings, supra*, at 472.

Congress was not concerned, in enacting ERISA, with regulating wages. Other federal laws, such as the Fair Labor Standards Act of 1938, 29 U.S.C. 218, govern wages, and, unlike ERISA, "do not seek to impose national uniformity through a broad preemption provision, but instead permit the states to provide more stringent protections if they wish" (*California Hosp. Ass'n*, 770 F.2d at 861). In light of ERISA's inapplicability to wages, and in response to numerous inquiries, the Secretary of Labor, who has authority to prescribe regulations "necessary or appropriate to carry out the provisions of [Title I of ERISA]" (29 U.S.C. 1135), promulgated the payroll practices regulation less than a year after ERISA was enacted in order "to resolve some of the questions of coverage which have been raised" as to the meaning of "employee benefit plan" (40 Fed. Reg. 24642 (1975)).

Recognizing that Congress had listed "vacation benefits" among the "welfare plans" enumerated in Section 3(1), that it was especially concerned with trust fund abuses, and that it did not intend to regulate wages, the Secretary concluded through the payroll practices regulation that vacation benefits paid out of general assets rather than through a trust fund are not governed by the statute.[6] As the Secretary explained when the regulation was proposed: "[P]aid vacations * * * are not treated as employee benefit plans because they are associated with regular wages

[6] Among the other payroll practices listed in the regulation are the payment of weekend premiums, the giving of holiday gifts, and scholarship programs where payments are made from the employer's general assets rather than from a trust fund. 29 C.F.R. 2510.3-1(b)(1), (d), and (k).

or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area, and there is no indication that Congress intended to subject these practices to Title I coverage." 40 Fed. Reg. 24642-24643 (1975). Thus, under the regulation, the payment of vacation benefits from a trust fund, which is a common practice where employees typically work for many employers in a single year, as do construction workers (see *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 4 & n.2 (1983)) and longshore workers (see *Mackey* v. *Lanier Collection Agency & Serv. Inc.*, No. 86-1387 (June 17, 1988), slip op. 1), is subject to ERISA. But otherwise the payment of vacation benefits is governed by state law.

Noting that Section 3(1) lists "vacation benefits" among the types of welfare plans governed by ERISA, the Massachusetts Supreme Judicial Court in *Barry* concluded that the payroll practices regulation is " 'at clear odds with language of the statute itself and an invalid arrogation of power by the Department' " (394 Mass. at 837, 478 N.E.2d at 712 (quoting *California Hosp. Ass'n*, 569 F. Supp. at 1546)).[7] However, the statutory provision does not state that *all*

[7] Two courts of appeals have also concluded that vacation benefits paid from an employer's general assets are governed by ERISA. In *Holland* v. *National Steel Corp.*, 791 F.2d 1132, 1135 (1986), the Fourth Circuit concluded that the payroll practices regulation is inconsistent with the plain meaning of the statutory definition of "employee welfare benefit plan," and in *Blakeman* v. *Mead Containers*, 779 F.2d 1146 (1985), the Sixth Circuit concluded, without citation of the payroll practices regulation, that a vacation pay plan was covered by ERISA.

vacation benefits are subject to federal regulation under ERISA. Nor does the statute define "vacation benefits." And the assertion that the payroll practices regulation is an "arrogation of power" by the Secretary of Labor is rather peculiar, since the consequence of the regulation is to remove the enumerated practices from the scope of the Secretary's authority.[8]

Two courts of appeals that have considered the treatment of vacation benefits in the payroll practices regulation have concluded that it is "a reasonable and permissible construction of the statute to exclude from its coverage * * * programs providing for the traditional vacation during which the employee continues to receive ordinary wages paid from the general assets of the business." *California Hosp. Ass'n*, 770 F.2d at 859; accord *Shea* v. *Wells Fargo Armored Serv. Corp.*, 810 F.2d 372, 376 (2d Cir. 1987). As the Ninth Circuit pointed out in *California Hosp. Ass'n*, the Department's regulation reasonably distinguishes vacation "payroll practices"

[8] Contrary to the suggestion of the Massachusetts Supreme Judicial Court in *Barry* (see page 6, *supra*), the payroll practices regulation cannot be construed as limited to informal vacation benefit programs, as distinguished from plans established by contract. Rather, as the court below correctly stated, "neither a formal, written plan nor a separate fund is a prerequisite to the establishment or maintenance of an ERISA employee benefit plan" (Pet. App. A11-A12); otherwise, employers could exempt plans from ERISA's coverage by failing to comply with its requirements. Moreover, the Secretary plainly intended to exempt all vacation plans where benefits are paid from general assets from ERISA's coverage, as nothing in the regulation or the Secretary's explanation of its purpose suggests that it would not exempt vacation benefits mandated by contract from the scope of the statute.

from ERISA-covered "vacation benefits" based both on the close affinity between paid vacation leave and ordinary cash wages and on the absence of a separate fund (770 F.2d at 862). Congress did not intend to make ERISA a vehicle for regulating ordinary wage practices, but instead sought to regulate the wide variety of fringe benefit programs that had developed since World War II (see S. Rep. 93-127, 93d Cong., 1st Sess. 3 (1973); H.R. Rep. 93-533, 93d Cong., 1st Sess. 2-4 (1973)). As the Ninth Circuit correctly concluded, the payroll practices described in the regulation are " 'easily analogized to ordinary wages.' " *California Hosp. Ass'n*, 770 F.2d at 860 (quoting *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985)). The continuation of an employee's salary while he is on vacation is particularly hard to distinguish from ordinary wages, and it is reasonable to treat those same vacation benefits no differently when they are paid at the termination of employment.[9]

Moreover, the "inclusion of routine vacations-with-pay within ERISA [would] contribute nothing to the

[9] The Ninth Circuit correctly rejected the argument that Congress, through its cross-reference in Section 3(1) to the benefits described in 29 U.S.C. 186(c)(6) (which mentions, inter alia, *pooled* vacation benefits), incorporated separately funded vacation benefit plans, and so, unless it intended to repeat itself, must have meant by its reference to vacation benefits in Section 3(1) to include vacation benefit plans where benefits are paid from an employer's general assets. That simply reads too much into the structure of Section 3(1). As the court stated in *California Hosp. Ass'n*: "Many of the benefits incorporated in section [3(1)] by the cross-reference to section 186(c) are already found in section [3(1)]. Thus it is evident that Congress was not concerned with duplication, but only with assuring that all benefits covered by section 186(c) were also covered by section [3(1)]." 770 F.2d at 861.

solution of the problems Congress sought to solve" (*California Hosp. Ass'n*, 770 F.2d at 860). As the Ninth Circuit pointed out, "[t]raditional vacations during which the employer continue[s] to pay the employees' regular wages present[] neither of the evils Congress intended to address" (*id.* at 859). Since vacation wages, like ordinary wages, are generally paid in cash from the employer's business resources, "[t]here is no fund to administer and no special risk of loss or nonpayment" (*ibid.*). The regulations do include within ERISA's coverage plans establishing trust funds for the payment of vacation leave because such plans raise one of Congress's concerns in enacting ERISA—the mismanagement of benefit funds. The Department's interpretation of the statute to cover vacation benefits paid from trust funds is consistent with the significant historical fact of which Congress was undoubtedly aware that collectively-bargained vacation benefit funds have long been the practice in a number of industries, most notably construction and longshoring (see page 14, *supra*). It was certainly reasonable for the Department, in construing "vacation benefits" in Section 3(1) of ERISA, to keep in mind Congress's likely concern with these specialized vacation benefit programs.[10]

Finally, as the Ninth Circuit recognized, inclusion of routine paid vacations within ERISA would "im-

[10] That is not to say that the existence of a trust fund is a prerequisite to coverage under ERISA. It is clear that, in the case of payments that are not analogous to wages, such as severance benefits, an employer's promise to pay the benefits from the employer's general assets establishes a plan subject to ERISA. See *Holland* v. *Burlington Indus.* and *Gilbert* v. *Burlington Indus.*

pose a substantial and needless burden upon employers and the federal courts." Employers would be subject to "numerous statutory requirements for formulating plans, establishing procedures, giving notices, and filing reports." 770 F.2d at 860-861 (citing 29 U.S.C. (& Supp. IV) 1022, 1022(b), 1024(a)(1), 1024(a)(2)(A), 1024(b), 1026(a), and 1133(1) and (2)). In addition, "[a]ny employee claiming denial of vacation leave could sue his employer in federal court" (*id.* at 861, citing 29 U.S.C. 1132(a)). Certainly, "[i]t is unlikely Congress intended to create burdens of this magnitude without evidence of need, and without comment" (770 F.2d at 861). See also *National Metalcrafters* v. *McNeil*, 784 F.2d 817, 823 (7th Cir. 1986) (declining to decide whether ERISA preempts a state's attempt to enforce a vacation plan, but noting that a ruling in favor of preemption "could bring a host of trivial cases into the federal courts"). Based on the purposes and legislative history of the statute, and given the "substantial and needless burden" that would be imposed by including paid vacations within ERISA, the Department's payroll practices regulation, which was adopted less than one year after ERISA was enacted, is a reasonable, contemporaneous construction of the statute which is entitled to deference by the courts. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); see also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The court below erroneously concluded that because the vacation payments at issue in this case would be received after termination of employment, they more closely resemble severance benefits than ordinary wages, and therefore fall outside the payroll practices regulation (Pet. App. A13). The Department

of Labor has interpreted its payroll practices regulation to exclude from ERISA's coverage all vacation benefits paid from general assets, including earned but unused vacation days, irrespective of when the payment is made. See Gov't Amicus Br. in Opp. at 9 n.5 in *California Hosp. Ass'n* v. *Henning*, No. 85-1648.[11] This is a sensible approach, since there is no good reason to view the character of vacation benefits as changing merely because they are paid upon termination of employment.[12] As the Second Circuit explained in *Shea*, where the vacation wages available to employees are not "contingent upon termination of employment or severance," but are payable whether or not employment continues, "[t]he conclusion is inescapable that [there is] no payroll *severance* policy" (810 F.2d at 377 (emphasis added)).

From the standpoint of the sponsoring employer, a traditional vacation policy is intended to provide employees with a respite during the course of employment; such a policy cannot be said to be "established or maintained * ** for the purpose of providing" severance benefits (29 U.S.C. 1002(1)). If an employee accrues vacation time and collects payment upon termination of employment, the entitle-

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[11] We have served a copy of our brief in *California Hosp. Ass'n* on the parties to this case.

[12] Only where a plan permitted employees to make an irrevocable deferral of vacation benefits, which were then available only upon termination of employment or, in the employer's discretion, upon demonstration of an immediate financial emergency, has the Department found that a plan in effect provided severance benefits as opposed to vacation pay. See *American Motors Corp.*, Advisory Op. 81-55A (Labor Dep't June 26, 1981).

ment still arises on account of the vacation benefit policy.[13] Even where there is an incentive for employees to delay taking vacations—to earn a greater return when leave is taken at a higher salary, or to provide a cushion in the event of layoff or termination of employment—the fundamental purpose and character of the benefit as periodically accrued vacation compensation does not change. See *Blue Cross & Blue Shield*, Advisory Op. 79-48A (Labor Dep't July 30, 1979) (accumulated paid sick leave is not the type of "benefit[] in the event of sickness" (29 U.S.C. 1002(1)) that Congress intended ERISA to cover). See also *Abella* v. *W.A. Foote Memorial Hosp. Inc.*, 557 F. Supp. 482 (E.D. Mich. 1983), aff'd per curiam, 740 F.2d 4 (6th Cir. 1984) (to the same effect regarding accumulated paid sick leave provided during the term of employment). Indeed, even should the employer offer an inducement to employees *not* to use their accumulated leave during some particular period, such inducement is not among the benefits covered in the Act. The payroll practices regulation

[13] The payroll practices regulation refers to "[p]ayments of compensation while an employee is on vacation." Contrary to the conclusion of the court below (Pet. App. A13), the Secretary did not intend by that language to require that a vacation plan provide that an employee must work for an employer both before and after a period for which vacation benefits are paid, or the plan would be deemed to be a severance pay plan. An employee may reasonably be viewed as being "on vacation" from an employer upon termination of employment. From the employer's perspective, it would make little difference if the employee returned to work for one day and then terminated the employment relationship; the primary difference would be that the employer would pay the employee periodically if he were returning to work, rather than in a lump sum. That difference does not transform a vacation benefit into a severance benefit.

specifically provides, with respect to vacation benefits, that the "payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons" is not an employee benefit governed by ERISA. If a premium paid to induce an employee to accrue vacation leave rather than take a vacation at an inconvenient time for the employer is not a welfare benefit, then the accrued vacation benefit should not be deemed to have been transformed into a severance benefit merely because it is collected upon termination of employment.

In sum, the Department's interpretation recognizes that vacation leave paid from an employer's general assets is simply a form of wages which, if not used during the life of the employment relationship, may be collected upon its termination. Because the Department's interpretation is consistent with the purposes and policies of the payroll practices regulation and the statute under which the regulation was promulgated, it is entitled to deference by the Court. *Northern Indiana Pub. Serv. Co.* v. *Porter County Chapter of the Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975) (per curiam). See also *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (in construing administrative regulations, the agency's interpretation carries "controlling weight" unless "plainly erroneous or inconsistent with the regulation.") At the very least, in the face of legislative or regulatory silence, "caution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980).[14]

[14] Massachusetts also argues that, under the rationale of *Fort Halifax* (see note 4, *supra*), the bank's policy of paying

II. IF THE BANK'S VACATION PAY POLICY IS A WELFARE PLAN GOVERNED BY ERISA, THEN THE MASSACHUSETTS STATUTE IS NOT SAVED FROM PREEMPTION UNDER SECTION 514(b)(4) AS A "GENERALLY APPLICABLE CRIMINAL LAW"

If we are correct in our conclusion that, under the payroll practices regulation, the bank's payment of vacation benefits is not a welfare plan governed by ERISA, then Massachusetts is free to regulate such

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for unused vacation leave upon termination of employment is not an employee benefit "plan" because it involves only "a one-time lump-sum payment triggered by a single event" and therefore "requires no administrative scheme whatsoever to meet the employer's obligation" (Pet. 22-25 (quoting *Fort Halifax*, slip op. 9)). We agree with the court below that there is no merit to that contention. As this Court explained in *Fort Halifax*, payments that are triggered by predictable and recurring events "may represent a one-time payment from the perspective of the beneficiaries, * * * [but] the employer clearly foresees the need to make regular payments * * * on an ongoing basis," and this "ongoing, predictable * * * obligation * * * creates the need for an administrative scheme to process claims and pay out benefits" (slip op. 12 n.9). Here, the bank's policy creates the need for an administrative scheme to pay accrued vacation benefits on an ongoing basis, since employees may terminate their employment and demand payment at any time.

This contrast between *Fort Halifax* and this case is illuminated by the discussion in the opinion in *Fort Halifax* of the severance pay plan at isue in *Holland* v. *Burlington Indus.* and *Gilbert* v. *Burlington Indus.*, where the courts held that an employer's promise to make severance payments from its general assets is a welfare plan covered by ERISA. There, this Court explained, " '[t]he employer had made a commitment to pay severance benefits to employees as each person left employment,' " and " '[t]his commitment created the need for an administrative scheme to pay these benefits on an ongoing basis' " (*Fort Halifax*, slip op. 15 n.10 (quoted at Pet. App. A19-A20)).

benefits. Accordingly, its prosecution of respondent for failing to pay the benefits promised would not be preempted. If, on the other hand, we are incorrect and the bank's vacation policy is subject to ERISA, the Court must construe ERISA's general preemption provision and its exception for generally applicable criminal laws to determine whether the prosecution is preempted.

Section 514(a) of ERISA generally preempts any and all state laws that "relate to any employee benefit plan." This Court has explained that a state law " 'relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with *or reference to* such a plan.' " *Mackey*, slip op. 3 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)) (emphasis in *Mackey*). As the court below recognized, the Massachusetts statute sought to be enforced in this case "represents an attempt by the State to enforce the provisions of the plan" (Pet. App. A23). Accordingly, the Massachusetts statute plainly "relate[s] to" the bank's payment of vacation benefits. Thus, if the bank's plan for the payment of vacation benefits out of general assets is governed by ERISA, the Massachusetts statute is preempted under Section 514(a) unless one of ERISA's exceptions applies.

Section 514(b)(4) of ERISA saves "any generally applicable criminal law of a State" from preemption, and Massachusetts contends that it applies here. In our view, however, the Massachusetts statute, which provides that a discharged employee "shall be paid in full on the day of his discharge," including any "vacation payments due," is not a "generally applicable criminal law" within the meaning of Section 514(b)(4). The majority of courts that have con-

sidered the matter have agreed, as the court below noted (Pet. App. A29-A30), that the exception "'seems directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example'" (*id.* at A29 (quoting *Federico*, 383 Mass. at 490, 419 N.E.2d at 1377)). The Massachusetts statute at issue does not apply to "conduct generally," but instead governs only the wage and benefit payment practices of employers. We doubt that Congress intended to save laws of such narrow focus.[15]

The legislative history is consistent with the view that only laws regulating general conduct, as opposed to laws specifically aimed at employee benefit plans, are saved from preemption by Section 514(b)(4). In enacting ERISA, the House and Senate both passed bills which generally preempted state laws regulating subject matter governed by ERISA, and neither contained a provision saving state criminal laws from preemption. See H.R. 2, 93d Cong., 1st Sess., § 699 (1973) (Senate); H.R. 2, 93d Cong., 2d Sess., § 514 (1974) (House). Both the broad preemption provi-

[15] In *Joseph W. Kane*, Advisory Op. 79-35A (Labor Dep't May 31, 1979), the Department of Labor opined that a state law prohibiting embezzlement from employee benefit plans, and applying only to such plans, was not a law of general applicability within the meaning of Section 514(b)(4). The Department added that general larceny statutes would be saved from preemption by that provision. The statute at issue here is slightly broader than that at issue in the 1979 advisory opinion, since it applies to wages as well as to certain fringe benefits. That difference does not, in our view, make it a generally applicable statute. A contrary conclusion would allow states to regulate all sorts of employee benefit plans simply by aiming criminal statutes at wages as well as benefits.

sion and the exception for generally applicable criminal laws were added by the Conference Committee (see H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 383 (1974)), whose primary objective was to expand the statute's preemptive effect. A House sponsor described "the reservation of Federal authority * * * to regulate the field of employee benefit plans" in the Conference substitute as the "crowning achievement" of ERISA. 120 Cong. Rec. 29197 (1974) (statement of Rep. Dent). In contrast, there was no indication that the exception for generally applicable criminal laws was to be construed broadly. To the contrary, one of the Senate sponsors stated that "with the *narrow exceptions* specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulation[]." *Id.* at 29933 (statement of Sen. Williams (emphasis added)). While they stressed that the preemptive effect of ERISA had been significantly broadened, the sponsors mentioned the exception for generally applicable criminal laws only in passing. *Id.* at 29942 (statement of Sen. Javits).

The minority of courts that have concluded that criminal laws relating to ERISA's subject matter are saved from preemption by Section 514(b)(4) have based that conclusion on the proposition that "a law is of general applicability if it extends to the entire state and embraces all persons or things in a particular class" (*Cairy* v. *Superior Court*, 192 Cal. App. 3d 844, 237 Cal. Rptr. 715, 717 (1987)), a view that originated in *Sasso* v. *Vachris*, 116 Misc. 2d 797, 800-801, 456 N.Y.S. 2d 629, 632 (1982). That interpretation of Section 514(b)(4) is plainly flawed since, under it, almost every state criminal law (and perhaps every such law), would be saved from pre-

emption. *Cairy*, 192 Cal. App. 3d at 844, 237 Cal. Rptr. at 717. It is difficult to think of a state criminal law that applies only in certain portions of a state, or one that governs only certain persons in the particular class at which the law is aimed; at the least, such laws are highly unusual. Such a construction would allow substantial involvement in the regulation of benefit plans by means of state criminal provisions aimed specifically at the performance of functions unique to such plans. That result would significantly erode the general purpose of ERISA to serve as the exclusive and comprehensive source of benefit plan regulation.

More specifically, this Court held in *Pilot Life Ins. Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op. 10, that "Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." The Court based that holding on the fact that ERISA contains "a comprehensive civil enforcement scheme" that would be undermined if claimants "were free to obtain remedies under state law that Congress rejected in ERISA" (slip op. 12). Under *Pilot Life*, it is clear that the two discharged bank vice presidents would not be able to pursue any civil remedies provided by Massachusetts law.

While the Massachusetts law at issue is a criminal statute, there can be no doubt that it is, in practice, primarily an avenue by which discharged employees may obtain unpaid wages and benefits. The

Massachusetts Supreme Judicial Court stated that "the statute as applied represents an attempt by the State to enforce the provisions of the [bank's vacation] plan" (Pet. App. A23). It reiterated that "'the state is attempting directly to regulate the terms and conditions of a [welfare benefit] plan by using its criminal law to obtain compliance with those terms and conditions'" (*id.* at A26 (quoting *Cairy*, 192 Cal. App. 3d at 843, 237 Cal. Rptr. at 717)). Congress provided no criminal penalties in ERISA for mere failure to pay benefits,[16] and petitioner's attempt to impose such penalties through a statute specifically directed at unpaid wages and benefits conflicts with ERISA's carefully balanced civil enforcement scheme as much, if not more, than did the attempt by the plaintiff in *Pilot Life* to obtain punitive damages under state common law (see slip op. 2, 7-8).[17]

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[16] Congress provided, in Section 501, 29 U.S.C. 1131, criminal penalties for willful violations of ERISA's reporting and disclosure provisions. It also provided criminal penalties in Section 511, 29 U.S.C. 1141, for certain coercive interferences with statutory or plan rights of participants and beneficiaries. Its provision of criminal penalties for such violations, but not for mere failure to pay benefits, supports the conclusion that it did not think that criminal penalties are appropriate in routine benefits claims disputes, but that the comprehensive civil penalties it provided in Section 502 are adequate to assist claimants in obtaining benefits due them. Accordingly, it would be contrary to Congress's intent to supplement the remedies available in cases involving claims for benefits with state law criminal actions.

[17] In *Kanne* v. *Connecticut General Life Ins. Co.*, No. 85-5642 (9th Cir. Oct. 4, 1988), the court recognized, following *Pilot Life*, that a law that fell into one of ERISA's exceptions for laws regulating insurance (slip op. 12500)) is nevertheless preempted if it "supplement[s] the ERISA civil enforcement provisions available to remedy improper claims

In addition, by requiring employers to pay vacation benefits immediately upon discharge, the Massachusetts statute conflicts with ERISA's regulation governing claims procedures. The regulation, which is authorized by 29 U.S.C. 1133, provides that employers must establish claims procedures, states that claims for benefits must be granted or denied within a reasonable time, and specifically provides that a period in excess of 90 days is generally unreasonable, although it allows for a further 90-day extension (29 C.F.R. 2560.503-1(e)(3)). Thus, under the regulation, and in contrast to the requirement of the Massachusetts statute that benefits be paid immediately, employers may have as long as 90 days or more to determine whether vacation benefits are due.

Finally, as this Court recognized in *Fort Halifax* (slip op. 6), the main purpose of ERISA's broad preemption provision is to eliminate the threat of conflicting and inconsistent state and local regulation, and laws such as the Massachusetts statute at issue impose differing, and sometimes inconsistent, requirements to govern the procedures for paying wages or benefits. For example, states sometimes vary the time of payment according to the occupation of the employee (see, *e.g.*, Ill. Rev. Stat. ch. 48, para. 39m-4 (1987)) or according to whether the employee is still employed, quit work, or was fired (see, *e.g.*, Mich. Comp. Laws §§ 408.472, 408.475 (1985); Wis. Stat. § 109.03 (1988)). States also impose their own recordkeeping and posting requirements (*e.g.*, Del. Code Ann. tit. 19, § 1108 (1985); N.H. Rev. Stat. Ann. § 275.49 (1987)), and sometimes more substantive obligations (see, *e.g.*, Cal. Lab. Code § 203.5 (West 1971 & 1988 Supp.) (bonding requirements to assure payment under certain state contracts); Okla. Stat. tit. 40, § 165.6 (1986) (liability of contractor for wages of a subcontractor's employees). State laws such as these, if applied to employee benefit plans, would effectively defeat ERISA's goal of allowing employers to meet their many ERISA obligations by establishing a uniform administrative scheme to guide claims processing and the disbursement of benefits. The result of such a patchwork scheme of regulation would be inefficient operation of benefit programs, "which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them" (*Fort Halifax*, slip op. 8).

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processing" (*id.* at 12501). Thus, even if the Massachusetts statute at issue were a "generally applicable" state law, it would nevertheless be preempted by ERISA's enforcement provisions.

CONCLUSION

The judgment of the Massachusetts Supreme Court should be reversed.

Respectfully submitted.

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NOVEMBER 1988

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 241699 60777